

**Testimony of Sandia Peak Tram and Ski Company
Concerning
Senate Bill No. 2018, 107th Congress, 2d Session
Presented at the April 24, 2002 Hearings
Before the
Senate Committee on Energy and Natural Resources
And
Senate Committee on Indian Affairs**

Introduction

Good afternoon, Mr. Chairmen and Honorable Committee Members. My name is Walter E. Stern; I am a lawyer with the New Mexico law firm of Modrall Sperling, and am here today on behalf of the Sandia Peak Tram and Ski Company ("Tram Company"). I have been actively involved since 1994 in the dispute and settlement efforts leading to the bill presently before the Committee. I want to thank the Chairmen and the rest of these Committees for the honor of testifying this afternoon concerning – and in general support of -- Senate Bill No. 2018, sponsored by Senator Bingaman of New Mexico.

Practice Background and Perspective

Since 1982, my law practice has been significantly devoted to the representation of non-Indian interests in Indian land claim cases, rights-of-way validity challenges, jurisdictional disputes, and related litigated matters, and to public land management matters. I also have been involved in a number of Indian lands transactions where the keys to success (both in the negotiation and the execution of the contract or other documentation) are clarity and fairness for all parties.

We believe we achieved these elements in the April 4, 2000 Settlement Agreement between the United States, the Pueblo of Sandia, and the Tram Company, which is a precursor to Senate Bill No. 2018. Of course, as with any collaborative document, we might have drawn some provisions differently than what was the product

of the negotiation. But, our goal was to provide an agreement that would stand the test of time, be clear, and provide a fair and permanent resolution of the matters at issue.

Sandia Peak Tram Company Background

The Sandia Peak Tram Company owns and operates one of the premier tourist attractions in New Mexico, serving over 300,000 visitors a year on its 2.7 mile aerial tramway, which runs from the base of the Sandia Mountains to the crest. The Tram Company has been involved in this matter for several reasons, not the least of which are that (1) the tramway line – the principal asset of the Company – traverses the area that is the subject of the Pueblo of Sandia’s land claim, and (2) tram customers use the tram to access the Sandia Wilderness Area. The Tram Company developed the aerial tramway on the west face of the Sandia Mountains adjacent to the City of Albuquerque in 1965, with the cooperation of the United States Forest Service and the Pueblo of Sandia. Since that time, the Company has had business relationships with the Pueblo and the Forest Service.

Presently, the Company holds a Special Use Permit issued by the Forest Service for the aerial tramway and an adjacent ski area on the east (or back) side of the Sandia Mountains. And, the Company, together with affiliated corporations, holds a business lease and certain rights-of-way located on lands long understood to be Pueblo of Sandia lands. Among other things, those limited duration rights-of-way provide road access to the Sandia Heights North subdivisions that lie adjacent to the area claimed by the Pueblo in the judicial and administrative proceedings that led to the introduction of Senate Bill No. 2018. In addition, the Tram Company and its affiliates played a role in the development of the Sandia Heights North subdivisions over the years, and still owns

commercial parcels adjacent to the base of the Tram within the Sandia Heights North subdivisions.

The Mediation and Going Forward

Because of its property interests in (and adjacent to) the area that is the subject of the Pueblo's land claim, the Tram Company participated from the outset in the mediated settlement negotiations that involved the Pueblo, the United States Departments of Justice, Interior and Agriculture, the City of Albuquerque, Bernalillo County, and the Sandia Mountain Coalition, a small group of property owners and recreational users. In the mediation, the Tram Company sought to protect the jurisdictional status quo with respect to the tramway line and to protect the Tram Company's other property interests – goals not dissimilar from the goals of homeowners in the Sandia Heights area.

The roughly 15 month long mediation effort resulted in the execution of a Settlement Agreement between the United States, the Pueblo and the Tram Company in April 2000. That agreement reflects significant concessions by the Pueblo and includes clear and unambiguous language protecting private property rights and providing for perpetual road and utility easements across Pueblo lands to the principal subdivisions adjacent to the area. Nonetheless, the City of Albuquerque, Bernalillo County and the Sandia Mountain Coalition withdrew from the mediation, despite substantial agreement between all interested parties to many of the core elements of the agreement. The Tram Company believes the Settlement Agreement was and is a fair, reasonable and permanent resolution of a complex set of disputes and land management issues. We continue to support that agreement.

Senate Bill No. 2018 seeks to work within the basic framework of the settlement agreement, and represents a thoughtful vehicle through which to resolve permanently the Pueblo of Sandia's land claim. Senate Bill No. 2018, in large measure, represents the fruits of the mediation labors with several modifications designed to address certain concerns expressed by the City, County and Coalition as they withdrew, and after they had withdrawn, from the mediation. We laud the bill's effort to bring other interested parties back into the discussion. While the original settlement is fair and reasonable to all parties in my judgment, I also believe that Senate Bill No. 2018 addresses the key concerns expressed by other parties in New Mexico.

The Tram Company is very appreciative of the efforts to help bridge the narrow gap between the final results of the mediation effort, which resulted in the execution of an agreement between the United States, the Pueblo and the Tram Company, and the positions asserted by the County, the City and the Sandia Mountain Coalition. I would add that the "gap" between the settling parties (the Tram, the United States and the Pueblo) and the non-settling parties (the City, County and Coalition) was never very large – in my view. In any event, it would appear that the revisions to the basic terms of the settlement that have been crafted in S. 2018 may promote bringing the range of diverse interests involved here together.

As the Chairman of the Energy and Natural Resources Committee has said, "this legislation does not give any party everything it sought, but it protects the interests of the Pueblo, the public, and the affected landowners...." In many respects, that is the measure of a good compromise. In addition, the bill includes carefully tailored

provisions that provide solutions largely unavailable to the federal courts were the dispute left to judicial resolution.

Recently, one of the lead representatives of the Sandia Mountain Coalition, Mr. Bill Kiely, recently commented on a public radio talk show that “we [presumably the Sandia Mountain Coalition] are very favorably dispose[d] to Senator Bingaman’s current version” of the settlement legislation. See Transcript of March 7, 2002 KUNM Call-In Show. Thus, it would appear that many of the parties in New Mexico interested in this matter may be drawing together in a consensus in support of Senate Bill No. 2018.

The Bill: S. 2018

Like Indian land settlement legislation before this, S. 2018 is narrowly tailored to address and permanently resolve a unique set of circumstances arising in New Mexico following the acts of two (if not three) sovereigns, beginning with a Spanish land grant in 1748, running through the era when Mexico ruled the region, and then the period following the 1848 Treaty of Guadalupe Hidalgo until now, when the region was part of the United States. This legislation follows a tradition of finely tuned congressional acts that have served to provide for the permanent resolution of Indian or tribal land claims throughout our great country. History has shown that complex issues like those with which we are faced here deserve narrowly tailored solutions that work best for the areas and communities affected. In this tradition, S. 2018 wisely and expressly disclaims that it serves as any precedent for other legislation.

The Tram Company believes that this bill is the best vehicle to resolve the Pueblo of Sandia land claim. Like the settlement agreement, the bill provides a permanent solution to a complex set of problems, and addresses issues and subjects

relating to the land claim that would not be resolved by the applicable federal agencies or the judiciary in the event the administrative and court proceedings continued to their conclusion. Without this legislative solution, the parties interested in this matter would be thrown back into another round of administrative and judicial proceedings that would last years and years, and even when finished would not address and resolve all the matters addressed in Senate Bill No. 2018. Without this legislative solution, the prospect looms that the area involved would be placed within the Pueblo boundaries and the Pueblo – as with the remainder of its Grant – would have the power to exclude (if it so chooses) non-members of the Pueblo from those lands. Without a legislative solution now, the existing window of opportunity so many have worked so diligently to open, may close.

This bill accomplishes a great deal, most of which is wholly without controversy:

- The bill provides for **continued federal ownership** of the federal lands at issue, for the continued administration of the area – including the lands subject to the Tram Company’s Special Use Permit -- by the United States Forest Service, and for the **continued preservation of the wilderness** and National Forest character of the area. The provisions accomplishing these things also serve to provide further assurances that there will be **no further development** of the National Forest and Wilderness lands in the area;
- Using other legislation as a guide, this bill provides a **limited management role for the Pueblo of Sandia** in the area, while **disclaiming in Section 10(c) that the Act would serve as precedent** for any subsequent land claim settlement legislation;

- This bill **clearly and unambiguously extinguishes the Pueblo's land claims**, thereby clearing title to the private lands, subdivisions, and lands subject to the Tram Company's Special Use Permit on which the aerial tramway and associated facilities sit. While the tramway line is located on Forest Service lands, the Tram's Special Use Permit (encompassing the tram line and associated facilities) will not be subject to the special land management regime established under the Bill;
- The bill provides clearly and expressly what the jurisdictional regime will be for the area, and for the private lands and property interests adjacent to the area – clearly preserving the jurisdictional status quo for the adjacent private lands and for the Tram Company's Special Use Permit so that the **Pueblo is recognized not to have any taxing or regulatory powers or any other jurisdictional or governmental authority over those private lands and interests**;
- The bill provides for the **grant of permanent access, through road and other rights-of-way, across existing Pueblo lands** to the Sandia Heights North subdivisions, among others; presently, the Tram Company and its affiliates hold rights-of-way and other interests that provide access for finite periods of time, but the legislation provides permanent rights-of-way for certain roads. It is important to note that in the absence of federal legislation, these matters will not be resolved in any ongoing litigation or administrative proceedings relating to the land claim. The Tram Company and its affiliates hold other interests within those road rights-of-way grants and other agreements, and the grants of permanent rights-of-way for roads shall be subject to those interests. To the extent that the

Tram Company and affiliated companies hold other interests within those rights-of-way, those companies will be able to exercise their remaining rights.

- The bill provides for a permanent right-of-way across existing Pueblo lands for a road that currently provides access to key recreational use areas and trailheads into the Sandia Wilderness Area and to the Tierra Monte subdivision, but which road is unpermitted (or to state it another way, is in trespass on Pueblo lands). Under similar circumstances, other Tribes have closed such roads. As a measure of its good faith and honorable dealing, the Pueblo has not taken such provocative action.
- Finally, the bill ratifies the Settlement Agreement reached between the United States, the Pueblo and the Tram Company, as modified by the legislation. Fair questions have been raised about the relationship between the settlement agreement and the legislation and how the two would be interpreted in relation to one another. We understand also that consideration has been given to doing away with the settlement as part of the overall resolution of this matter. While that may be workable, consideration should be given to the fact that the Pueblo's execution of the settlement agreement represents an act of the Pueblo, and its proposed commitments and actions in that agreement, including its disclaimer of any right, title, claim or interest in the subdivisions and other lands, constitute significant benefits to the other interested parties.

Precedent for Senate Bill No. 2018

Some legitimate questions have been raised about this legislation from the viewpoint of national precedent. Respectfully, as suggested previously, over the years,

Congress has engaged in a fine tradition of seeking to resolve tribal land claims with unique and narrowly tailored legislative solutions, crafted to fit the circumstances and the needs of the local community. That is precisely what this bill is and does. There is precedent for much, if not all, of what Senate Bill No. 2018 seeks to achieve and how it seeks to achieve it:

In the 103rd Congress, for example, the Crow Boundary Settlement Act of 1994 was enacted, resolving a reservation boundary dispute in the State of Montana. There, an 1889-1891 survey resulted in the erroneous exclusion of an approximately 36,000 acre strip of land from the Crow Reservation. Notwithstanding the lengthy passage of time, Congress passed settlement legislation thoughtfully and narrowly crafted to redress the survey error. See 25 U.S.C. §§ 1776 – 1776k, Public Law No. 103-444, 108 Stat. 4632. Recognizing the Crow Tribe’s claim and the survey error, the Act provided the Tribe with certain attributes of beneficial ownership in the disputed area. And, that Act also ratified a settlement agreement, “to the extent that such Settlement Agreement does not conflict with this subchapter.” 25 U.S.C. § 1776b(b). Thus, there is precedent for resolving an old survey dispute involving Indian lands boundaries, and there is precedent for providing the involved tribe with indicia (or benefits) of ownership in the process.

More recently, to settle a land claim in northern California, Congress completely redrew a boundary between the Six Rivers National Forest and the Hoopa Valley Reservation resulting in the reduction of the National Forest and the addition of over 2600 acres to the Hoopa Valley Reservation. This legislation arose from a land claim in which the Hoopa Valley Tribe asserted that there was an “error in establishing the

boundaries of the Hoopa Valley Reservation.” See Hoopa Valley Reservation South Boundary Adjustment Act, Public Law No. 105-79. S. 2018, although addressing a tract of land about four times larger than the Hoopa Valley tract, provides for far more modest jurisdictional and beneficial ownership changes to the lands involved in contrast to the complete transfer of beneficial title to the Hoopa Valley Tribe. S. 2018 is more narrowly tailored. First, it does not grant the Pueblo the power to exclude and make all management decisions. Second, title remains in the United States and the Forest Service retains the principal management role.

Also, recently, Congress has determined to provide a federal land management role for Indian tribes in the resolution of tribal land claims. For example, the Valles Caldera Preservation Act, enacted in the last Congress, provides that the Trust, which is to administer the lands subject to the Act, to consult and cooperate with Indian tribes and Pueblos in New Mexico, including the Pueblo of Santa Clara, on management practices that affect those tribes and Pueblos. And, in the Steens Mountain Cooperative Management and Protection Act of 2002, also enacted during the 106th Congress, Congress provided that the Secretary of the Interior shall adopt a management plan for federal public lands in the great State of Oregon that “shall provide for coordination with ...the Burns Paiute Tribe.” See Section 111(b)(3). Thus, existing public laws provide an express management role for tribes.

Similarly, in Public Law No. 105-313, the Miccosukee Reserved Area Act, Congress provided for the permanent residence of Miccosukee Indians in the congressionally established Florida Everglades National Park without the need for those people to seek and obtain a special use permit from the land management agency.

That Act provided that the lands within the previously established Park would be subject to Miccosukee Tribe's "exclusive right" to use the lands designated "in perpetuity", that the Tribe would have the power to make its own laws and be governed by them, and that the lands would be considered "Indian Country" for jurisdictional purposes.

In addition, in the Timbisha Shoshone Homeland Act of 2000, Public Law No. 106-423, involving both National Park Service and BLM lands in Nevada and California, Congress recognized certain rights and interests of the Timbisha Shoshone in the Park and on BLM lands, including access to those lands for traditional, cultural and religious purposes. Moreover, the Timbisha Shoshone Homeland Act also requires the Park Service and the BLM to close certain lands when requested by the Tribe "in order to protect the privacy of tribal members engaging in traditional cultural and religious activities...." See Section 5(e)(5)(E)(i) of Public Law No. 106-423. Senate Bill No. 2018, which provides special use rights on federal public lands for the members of the Pueblo of Sandia, without seeking a permit, therefore, is not without precedent.

Thus, there is precedent for much, if not all, of the key elements of Senate Bill No. 2018. There is even precedent for Section 10(c), which states that the Act is not to be considered precedent. See Miccosukee Reserved Area Act, § 8(c). But, even if precise precedent does not exist for every element of the bill, there is precedent in this august body's work to resolve Indian land claims with legislation narrowly tailored to address the unique circumstances and history presented.

Conclusion

We urge the Committee to consider the Settlement Agreement as the proper guide for the enactment of settlement legislation, and we laud the effort to propose

legislation that seeks to address the concerns of other interested parties while seeking to preserve the essence of the Settlement Agreement. We urge prompt action. Without a legislative solution in hand by November 15, 2002, this matter will be back in the courts and administrative agencies – likely for years. And, despite some bullish predictions from some who have opposed settlement in the past, there is no certainty that the claim will be resolved satisfactorily for the non-Indian interests. In the event the Pueblo wins the litigation, it would have the power to exclude non-Indians (although it may not choose to exercise it), and access to a cherished public resource could be lost to those of us who are not Pueblo members. And, even if those who oppose the Pueblo succeed in the litigation and defeat the claim, those people may find that they no longer have the ability to travel on certain roads because there is no valid right-of-way. We stand ready to work with the Committee to advance this bill to successful passage.

Thank you for your attention.

W0223390.DOC